88-1571

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

THOMAS H. DeLORENZO, MARLENE S. DeLORENZO AND HILLS OF WARREN,

Petitioners,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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Dated: March 23, 1989

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QUESTION PRESENTED

Whether a State Court decision which radically and unforeseeably effects a change in State law, and which results in private property being turned over to the State for public use, violates the property owners' Fifth and Fourteenth Amendment rights as against a public taking without due process of law or just compensation.

PARTIES TO THE PROCEEDING

In addition to the Petitioners, Thomas H. DeLorenzo, Marlene S. DeLorenzo, and Hills of Warren, a partnership, there were three Defendants in the New Jersey action who are not parties to this Petition, and who were not parties to the appeal to which this Petition seeks review. These parties include Harry DeLorenzo, Jr., Doris C. DeLorenzo and East Penn Sanitation, Inc. Respondent State of New Jersey, Department of Environmental Protection, was the sole Plaintiff in the state action.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Authorities iv

Opinions Below 1

Jurisdictional Statement 2

Constitutional Provisions Involved 2

Statement of the Case 3

Argument

I IN ADOPTING A NOVEL APPLICATION OF THE CORPORATE OPPORTUNITY DOCTRINE, THE NEW JERSEY COURTS INITIATED A RADICAL AND UNFORESEEABLE CHANGE IN STATE LAW WHICH RESULTED IN PETITIONERS' PROPERTY BEING AWARDED TO THE STATE WITHOUT JUST COMPENSATION OR DUE PROCESS, THUS INFRINGING PETITIONERS' RIGHTS PURSUANT TO THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION 7

Conclusion 17

Appendix

Judgment and Opinion of New Jersey Superior Court-Chancery Division ..... App. 1

Opinion of New Jersey Superior Court-Appellate Division ..... App. 27

Order of New Jersey Supreme Court ..... App. 31

TABLE OF AUTHORITIES

Page

CASES

Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973) 9, 10, 11, 12

Chicago, Burlington And Quincy Railroad Co. v. Chicago, 166 U.S. 266 (1897) 14

Francis v. United Jersey Bank, 87 N.J. 15, 432 A.2d 814 (1981) 16

Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939) 12

In re Gordon Car & Truck Rental, Inc., 65 B.R. 371 (Bkrtcy N.D.N.Y. 1986) 12

Hughes v. State of Washington, 389 U.S. 290 (1967) 8, 9, 10, 11, 12

Nollan v. California Coastal Commission, ___ U.S. ___, 107 S. Ct. 3141 (1987) 8

Oregon v. Corvalis Sand and Gravel Company, 429 U.S. 363 (1977) 10, 11

Roberts v. City of New York, 295 U.S. 264 (1935) 8

Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *aff'd.*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 447 U.S. 902 (1986) ... 11, 12, 13, 14

Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) 10, 11, 12, 13

Solimine v. Hollander, 128 N.J. Eq. 228, 16 A.2d 203 (Ch. 1940) 12, 13

State, Department of Environmental Protection v. Ventron, 94 N.J. 473, 468 A.2d 150 (1983) 17

In re Tufts Electronics, Inc., 746 F.2d 915 (1st Cir. 1984) 12

TABLE OF AUTHORITIES – Continued

Page

Valle v. North Jersey Automobile Club, 141 N.J. Super 568, 359 A.2d 504 (App. Div. 1976), *aff'd.*, 74 N.J. 109, 376 A.2d 1192 (1977) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 2

U.S. Const. amend. XIV 3

STATUTES

28 U.S.C. § 1257 2

N.J.S.A. 14A:6-12 (Supp. 1988) 16

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STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Petitioners, Thomas H. DeLorenzo, Marlene S. DeLorenzo and Hills of Warren, respectfully pray that a Writ of Certiorari be issued reviewing the judgment of the New Jersey Supreme Court, on the basis that the application of a novel application of state law deprived the Petitioners of due process of law, and resulted in a public taking without just compensation.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey-Chancery Division is set out in the attached Appendix at

App. 4 to App. 26. The opinion of the Appellate Division is set out at App. 27 to App. 30. The Order of the New Jersey Supreme Court is set out at App. 31.

All of these opinions are unreported.

JURISDICTIONAL STATEMENT

On April 16, 1986, the Superior Court of New Jersey-Chancery Division rendered a decision which, *inter alia*, divested Petitioners of their interest in certain New Jersey property. Petitioners appealed to the Superior Court of New Jersey-Appellate Division, which affirmed the judgment of the trial court in an Opinion filed December 15, 1987. Petitioners then submitted a Petition for Certification to the New Jersey Supreme Court which, after first granting Certification, later denied Certification in an Order filed December 23, 1988.

Jurisdiction of this Court to review the above Judgment and decrees is conferred by 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or

> property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

Petitioners Thomas H. DeLorenzo and Marlene S. DeLorenzo are shareholders of a corporation known as High Point Sanitation Company ("High Point"). Aside from the individual Petitioners, the only other shareholders of High Point are Harry DeLorenzo, Jr., and Doris C. DeLorenzo. (App. 7). Up until 1983, High Point operated a landfill operation in Warren County, New Jersey. (App. 6).

In July, 1984, the New Jersey Chancery Division ordered that the Commissioner of the New Jersey Department of Environmental Protection ("DEP") be appointed as receiver of all operations of the landfill, so as to effectuate a closing of the landfill. (App. 14).

In September, 1985, the DEP filed an Amended Verified Complaint in the Superior Court-Chancery Division. Although the Complaint contained several Counts, the

only one relevant to this Petition is Count II, which demanded, *inter alia*, that the DeLorenzos transfer title to 280 acres of land adjacent to the landfill which had been in the names of the four individuals.

As the trial court found, the subject parcel of land, known as the Round Valley property, became available for purchase in 1975. (App. 7). The DeLorenzos jointly purchased the property on August 14, 1975. (App. 9).

The purchase price of Round Valley was $280,000.00, with $26,000.00 coming from the personal funds of Harry and Marlene DeLorenzo. (App. 10).

Following the purchase of the Round Valley property, the DeLorenzos arranged that the mortgage and taxes for Round Valley were to be paid from the accounts of High Point. (App. 10). Such payments were noted in the corporate books as loans to the individuals. (App. 11). The DeLorenzos failed, however, to meet the formal requirements of the New Jersey Business Corporation Act regarding such loans, and thus the court found that "there was a substantial lack of attention to acquire the procedures in the way these so-called loans were treated." (App. 12).

Despite the lack of formality, the trial court held that the DeLorenzos were not engaged in a swindle. (App. 19). In fact, the court found that they were always "open and aboveboard about what they were doing" and that "there was not a conscious desire or intent on the part of any of the DeLorenzos to cheat the public or cheat the State or cheat the corporation. . . ." (App. 19).

It should be noted that the Round Valley property is divided into two parcels by railroad tracks. (App. 7). The parcel south of the tracks, and adjacent to the High Point's landfill, constitutes approximately 160 acres. (App. 7). As the trial court noted, this southern tract needs to be used physically for the closure of the landfill. (App. 17).

The tract north of the railroad tracks, however, constitutes approximately 120 acres which is not physically necessary, or useful, to the operation or closure of the landfill. (App. 20).

As the trial court noted, it had been the intent of the DeLorenzos to give the southern tract to the corporation for operation and closure of the landfill. (App. 19). Thus, the DeLorenzos, in utilizing corporate funds for this purchase, not only intended to repay the funds borrowed, but also intended to give the corporation of the benefit 160 acres of useful land.

Since Petitioners always intended that the corporation have the benefit of the southern tract, they did not challenge below, nor do they challenge now, the decision of the court to provide that tract to the State. The issue throughout this litigation has been whether the State is also entitled to the northern tract, since there had never been an intent by the individuals to acquire that parcel for the corporation.

Despite the trial court's findings that the individuals had intended to borrow money from the corporation to purchase the subject property themselves, and despite the finding that they did so without an intent to harm the corporation, the trial court held that the individuals were

required to turn over both parcels of Round Valley to the DEP, as receiver for High Point. (App. 3). The basis for the trial court's holding was what it referred to as a "backwards application of the doctrine of Corporate Opportunity." (App. 8).

In essence, apparently because the corporation involved was in the landfill business, the individuals were ascribed a duty to hand over Round Valley, a potential investment, to the corporation in 1975. (App. 7 to App. 8). The trial court implied that duty despite the fact that all shareholders participated in the opportunity, despite the fact that they had acted without intent to harm the corporation or the public, and despite the fact that the northern tract was not in the line of business of a landfill operation.

Because this novel application of corporate opportunity was not requested by the DEP at trial, and because Petitioners had no notice that such a theory would be adopted by the trial court, Petitioners did not have an opportunity to raise constitutional objections thereto prior to the decision of the Chancery Division. However, in the subsequent appeal to the Appellate Division, Petitioners did argue, *inter alia*, that the decision of the trial court constituted a taking which violated Petitioners' Fourteenth Amendment rights relating to just compensation and due process of law.

The Appellate Division affirmed the Chancery Division "substantially for the reasons expressed by Judge Stanton." (App. 30). The Appellate Division held that "defendants' contention that they were unconstitutionally deprived of their property must be rejected." (App. 30).

Petitioners again challenged the constitutionality of the trial court's decision in their Petition for Certification to the New Jersey Supreme Court. That court, after initially granting certification and providing oral argument, ordered that the appeal be dismissed on the basis that certification had been improvidently granted. (App. 31).

ARGUMENT

IN ADOPTING A NOVEL APPLICATION OF THE CORPORATE OPPORTUNITY DOCTRINE, THE NEW JERSEY COURTS INITIATED A RADICAL AND UNFORESEEABLE CHANGE IN STATE LAW WHICH RESULTED IN PETITIONERS' PROPERTY BEING AWARDED TO THE STATE WITHOUT JUST COMPENSATION OR DUE PROCESS, THUS INFRINGING PETITIONERS' RIGHTS PURSUANT TO THE FIFTH AMENDMENT AND FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Petitioners challenge the constitutionality of the decision of the New Jersey Superior Court-Chancery Division to apply a novel application of the corporate opportunity doctrine in order to divest Petitioners of real property, and to transfer control and interest in such property to a Division of the State of New Jersey. (App. 4 to App. 26). More specifically, Petitioners seek review of the decision of the Superior Court of New Jersey-Appellate Division which rejected Petitioners' claim that the Order of the Trial Court violated Petitioners' rights pursuant to U.S. Const. amend. 14 as against the taking of private property for public use without just compensation or due process of law. (App. 30).

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As will be set out in this Argument, case law strongly suggests where a state court effectuates a radical and unforeseeable change in state law which has the effect of transferring private property to the State without just compensation, such a change in state law infringes on the legitimate expectations of individuals in vested property rights, and thus constitutes an unconstitutional taking by the State. Petitioners assert that the ruling of the Trial Court, given the circumstances of this case, necessarily implies that such a radical and unforeseeable change was utilized by the state courts of New Jersey.

At the outset, it has been noted that "[a]s a general proposition [,] the law of real property is, under our Constitution, left to the individual States to develop and administer." *Nollan v. California Coastal Commission*, ___ U.S. ___, 107 S.Ct. 3141, 3158 (1987), *quoting Hughes v. State of Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring). It is clear, however, that a state court's determination as to whether a property interest exists is not beyond review. *See e.g., Roberts v. City of New York*, 295 U.S. 264, 277 (1935) (gross and obvious error by state court may amount to taking for the state without due process).

An issue not yet addressed by this Court, however, is that of whether a State Court which takes private property for the benefit of the State through a radical, unexpected and retroactive change in state law, effectuates an unconstitutional taking. Although this issue has not been decided by this Court, it has been raised in several decisions.

In *Hughes v. State of Washington*, 389 U.S. 290 (1967), the owner of beach front property brought an action in Washington state court to determine ownership of accretions that had been gradually formed along the property by the ocean. The Washington Supreme Court held that title to the accretions vested in the state rather than the abutting landowner, *id.* at 291, thus depriving the owner of a substantial amount of property to which she had held title under pre-existing state law. On appeal, this Court reversed, holding that federal law, and not state law, controlled. *Id.* at 292-93.

In a concurring opinion, however, Mr. Justice Stewart asserted that if state law applied, the decision of the Washington Supreme Court constituted an unconstitutional taking. Addressing the sudden and unexpected change in state law, Mr. Justice Stewart wrote:

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain . . . Although the State in this case made no attempt to take accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property-without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the Judgment.
>
> *Id.* at 297-98 (Stewart, J., concurring).

The above quoted language was later cited with approval in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 331 (1973). *Bonelli* likewise ruled that the extent of a state's

rights as to submerged land was governed by federal law, but noted in *dicta* that a "serious constitutional issue" would be raised if state law applied, given the sudden assertion of title by the state. *Id.* at 331. Although *Bonelli* was subsequently overruled by *Oregon v. Corvalis Sand and Gravel Company*, 429 U.S. 363 (1977), at least one lower court has commented that "the effect of *Oregon* was to give added weight to the *Hughes* opinion of Mr. Justice Stewart. . . ." *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 481 (D. Hawaii 1978).

While this Court has considered the issue of unconstitutional takings by state courts only in *dicta*, lower federal courts have addressed the issue directly. In *Sotomura*, for instance, owners of beachfront property in Hawaii received an adverse decision by the Hawaii Supreme Court that the seaward boundary of land in that state extended only to the upper reaches of the wash of the waves. 460 F. Supp. at 476. This ruling severely diminished the land area the owners had previously been entitled to under state law. In a subsequent action brought by the property owners in federal court, the District Court for the District of Hawaii noted:

> This Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Hawaii Supreme Court that, following erosion, the monument by which the seaward boundary of seaward land in Hawaii is to be fixed is the upper reaches of the wash of the waves. To the contrary, the evidence introduced in this case firmly establishes that the common law, followed by both legal precedent and historical practice, fixes the high water mark and seaward boundaries with reference to tides, as opposed to the run or reach of waves on the shore.

460 F. Supp. at 480.

After analyzing the *Hughes*, *Bonelli* and *Oregon* decisions, the *Sotomura* Court concluded that "[i]n an appropriate case, it now appears that the United States Supreme Court today would probably vote with Mr. Justice Stewart in ruling that a taking of private property through a radical and retroactive change in state law, effected by judicial decision, is an unconstitutional taking." *Id.* at 481. On that basis, the Court held that the decision of the Hawaii Supreme Court had infringed the due process rights of the owners. *Id.* at 482-83.

Likewise, in *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Hawaii 1977), *aff'd.*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986), the District of Hawaii considered another decision of the Hawaii Supreme Court which had held that surplus water from rivers belonged to the state, even though precedent had held that property owners had title to, and a right to divert, such surplus water. 441 F. Supp. at 563.

The District Court found no precedent for the state court decision, and noted in fact that the Hawaii Supreme Court "had to toss aside as dicta all of the mass of prior decisions to the contrary, turn its then blind eyes toward the rule of stare decisis, tear apart the doctrine of res judicata, and discover completely new meanings in ambiguous Hawaiian words and phrases used a century before in order to change the law of water rights and gift wrap the waters for the State." *Id.* at 585. Citing the concurring opinion of Mr. Justice Stewart in *Hughes*, the Court declared the relevant portions of the decision of the Hawaii Supreme Court "untenable and void." *Id.* at 585-586.

The concerns anticipated in *Hughes* and *Bonelli*, and addressed in *Sotomura* and *Robinson*, are clearly present in this case. In holding that the Round Valley Property was the property of the corporation from the date of its purchase (App. 25), and that the land had never been the property of Petitioners, the trial court applied a doctrine which the court itself referred to as "a kind of backwards application of corporate opportunity." (App. 8). As in *Sotomura* and *Robinson*, this novel application flies in the face of established precedent, and constitutes an unforseeable and radical change in state law which results in private property being turned over to the state.

Since the seminal case of *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503 (Sup. Ct. 1939), an essential element necessary to invoke the corporate opportunity doctrine is that the opportunity be "in the line of the corporation's business." *Id.* at 272, 5 A.2d at 511. New Jersey predecent adopts this limitation on the doctrine. *See e.g., Valle v. North Jersey Automobile Club*, 141 N.J. Super 568, 573-74, 359 A.2d 504, 507 (App. Div. 1976), *aff'd*, 74 N.J. 109, 376 A.2d 1192 (1977); *Solimine v. Hollander*, 128 N.J.Eq., 228, 246, 16 A.2d 203, 215 (Ch. 1940).

Although the issue presents itself less often, it is also accepted in common law that the doctrine of corporate opportunity is inapplicable where there is full disclosure to, and consent by, the shareholders of the corporation as to the taking of the opportunity. *See In re Tufts Electronics, Inc.*, 746 F.2d 915, 917 (1st Cir. 1984) (because corporate opportunity is a doctrine of disclosure, doctrine is inapposite where a sole shareholder of a corporation takes an opportunity for himself); *In re Gordon Car & Truck Rental, Inc.* 65 B.R. 371, 376 (Bkrtcy. N.D.N.Y. 1986) (corporate

opportunity doctrine is inapplicable where all three shareholders of corporation participate in opportunity). *See also Solimine*, 128 N.J. Eq. at 290, 16 A.2d at 235 (acquiescense of shareholders regarding taking of corporate opportunity is a valid defense).

The trial court's novel application of the corporate opportunity doctrine deleted both the "line of business" and "lack of disclosure" limitations required in order to invoke the doctrine. In essence, the trial court ruled that, at least in the case of corporations which operate landfills, courts may review the personal transactions of officers and directors and, where hindsight shows that a corporation would have benefited from the investment, the opportunity can be declared to be the property of the corporation.

The trial court's ruling takes a fidicuary duty normally owed to fellow shareholders, and extends it to the public at large. While it could easily be argued that this new application of corporate opportunity extends the fidicuary duty of directors beyond any reasonable limits, and that a state would be ill-advised to adopt this new rule even prospectively, what is important to the consideration of this Petition is that the rule constitutes such a radical departure from accepted precedent that the Petitioners could not have foreseen this change in the law. As in *Sotomura* and *Robinson*, the trial court's ruling was the result of a "perverse reading of prior law," *Robinson*, 441 F. Supp. at 585, constituting an "abrupt change in state law, not foreshadowed by, and unpredictable in view of, existing precedent. . . ." *Sotomura* 460 F. Supp. at 481. More importantly, as in *Sotomura* and *Robinson*, the change in state law effectively resulted in the private

property of the Petitioners being handed over to the State without any compensation.

It is easy to discern the motivation of the trial court in applying a novel application of corporate opportunity. In justifying its rule, the Court extensively discussed the policy considerations involved; noting that the closing of a landfill today is extremely expensive (App. 15 to App. 16), that landfill operators should have a substantial responsibility to the public in closing the landfill (App. 18 to App. 19), and that the property involved, given its likely value on the open market, "would be helpful to the commissioner and in fulfilling his responsibilities to close the landfill, in a sanitary and safe way." (App. 17). As *Sotomura* noted, however, "[a] desire to promote public policy . . . does not constitute justification for taking private property without compensation. The Fourteenth Amendment forbids it." 460 F. Supp. at 481, *citing, Chicago, Burlington and Quincy Railroad Co. v. Chicago,* 166 U.S. 266 (1897); *Robinson v. Ariyoshi,* 441 F. Supp. 559 (D. Hawaii 1977).

Moreover, the public policies discussed by the trial court related primarily the needs of the State to acquire funds to close landfills, and to the "helpfulness" of the subject parcel in assisting the state to close the landfill. It is difficult to escape the conclusion that the consideration which caused the court to divert from accepted rules is that of the need of the State to acquire capital to close landfills. However, the need of the State for a particular piece of property does not relieve it of its obligation to compensate the owners thereof.

Finally, it should be noted that the New Jersey Appellate Division, in affirming, suggested the possibility of some alternative theory of liability, stating:

> Irrespective of whether the initial purchase of the Round Valley property was designed to benefit High Point or its shareholders as individuals, and irrespective of whether the "corporate opportunity" doctrine strictly applies, we are satisfied, particularly in light of the use of High Point assets to purchase and maintain the property, that the record fully supports Judge Stanton's findings and conclusions.

(App. 30)

In essence, the Appellate Division implied that some alternative theory might justify the trial court's result, and that such theory would not depend on the intent of the parties in entering into the transaction, nor on the corporate opportunity doctrine. The Appellate Division did not identify this theory. More importantly, while the appellate court noted that corporate funds were utilized in purchasing the property, it ignored entirely the factual findings of the trial court which dispel any implication that the corporate coffers were raided. Specifically, the trial court found that there was an effort to treat the corporation's payments as loans to the Petitioners, and that such payments "were set up in the books of High Point as loans to the DeLorenzos." (App. 11) Moreover, the trial court found that although the Petitioners "were sloppy in their mechanical procedures, they were always open and above board about what they were doing." (App. 19). Finally, the court found that "there was not a conscious desire or intent on the part of any of the DeLorenzos to cheat the public or cheat the State or cheat the corporation . . . " (App. 19).

Given the trial court's factual findings, left undisturbed by the Appellate Division, the only fair way to characterize this transaction is that the Petitioners intended to take on the risks and benefits of this investment individually, and that they, in good faith, intended to borrow funds from the corporation. The only wrong that can be attributed to them is that they, without any intent to defraud or harm, did not strictly follow the requirements relating to such loans.

The New Jersey corporate statutes provide a remedy where a loan is made to a director, officer or employee without following the necessary form. As is noted in N.J.S.A. 14A:6-12(1)(e) (Supp. 1988), the director concurring in such a loan is "liable to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons, respectively, as a result of any such action." As the language of the statute suggests, and New Jersey case law supports, the remedy for an improper loan is to compensate the corporation, which in most instances requires the director to repay the value of the loan. *See Francis v. United Jersey Bank*, 87 N.J. 15, 432 A.2d 814 (1981). In no way can the Statute be read to require the recipient of the loan to turn over all investments made with the borrowed funds, especially in a case which does not involve bad faith on the part of the borrower. Thus the Appellate Division could not reasonably rely on the corporate statutes in providing a theory justifying the trial court's ruling.

The factual findings of the trial court would also bar the use of any equitable theory justifying the taking of individual assets to satisfy corporate debts. Under accepted New Jersey law, any theory relating to "piercing

the corporate veil" or "alter ego" requires a factual finding that the principal abused the corporate form "to perpetrate a fraud or injustice, or otherwise to circumvent the law." *State, Department of Environmental Protection v. Ventron*, 94 N.J. 473, 501, 468 A.2d 150, 164 (1983). The factual findings relating to the lack of any intent to harm or swindle on the part of the Delorenzos bar the state court's use of this doctrine.

In sum, it is impossible for the New Jersey Courts to justify the holding in this case without effecting some drastic change in state law which is both abrupt and unforeshadowed by existing precedent. Since this change resulted in the property of Petitioners being handed over to the State, the cases cited herein strongly suggest that the decisions of the New Jersey courts effected an unconstitutional taking of Petitioners' property without just compensation.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court issue a Writ of Certiorari to review the decision of the New Jersey Supreme Court and embodying the lower courts.

Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – WARREN COUNTY
DOCKETS NOS. C-2156-84E/C-2154-84E

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff, V. HIGH POINT SANITATION COMPANY, A corporation of the State of New Jersey, THOMAS H. DE LORENZO; HARRY DE LORENZO, JR.; DORIS C. DE LORENZO; HILLS OF WARREN, A partnership of the State of New Jersey; and EAST PENN SANITATION, a Pennsylvania corporation doing business in New Jersey, a/k/a HERCEG HAULING COMPANY, Defendants.	Civil Action JUDGMENT (Filed May 5, 1986)

TOWNSHIP OF FRANKLIN,
Plaintiff,
v.
HIGH POINT SANITATION CO., INC., HARRY DE LORENZO, THOMAS DE LORENZO, AND GREG DE LORENZO,
Defendants.

THIS MATTER having been opened to the Court by W. Cary Edwards, Attorney General of New Jersey, attorney for Plaintiff State of New Jersey, Department of Environmental Protection, Dale Laster Lessne, Deputy Attorney General, appearing in the presence of John C. Cornish, Esq., attorney for Defendants Thomas H. DeLorenzo, Marlene S. DeLorenzo, Hills of Warren and East Penn Sanitation Inc., a/k/a Herceg Hauling Company and the Court having ordered that the Clerk of the Superior Court shall enter a default against Defendants Harry DeLorenzo, Jr. and Doris C. DeLorenzo, and the Court having considered the pleadings filed by the parties, the testimony presented, exhibits submitted and statements of counsel at the trial on April 15, 1986; and

The Court having further rendered an oral decision on April 16, 1986 in favor of Plaintiff State of New Jersey, Department of Environmental Protection;

IT IS on this 3 day of May, 1986,

ORDERED, in accordance with the oral decision of the Court and the findings and conclusions set forth therein, that:

1. Defendants Thomas H. DeLorenzo, Marlene S. DeLorenzo, Harry DeLorenzo, Jr., and Doris C. DeLorenzo shall immediately convey all of their interests in the real property designated as Lots 9, 22, 23 of Block 16 and Lots 33, 34 and 35 of Block 46 on the Tax Map of Franklin Township, Warren County, New Jersey, to Defendant High Point Sanitation Company by delivering the deed for said property to High Point no later than thirty (30) days from the date of the oral decision of the Court or by May 16, 1986;

2. Should defendants Thomas H. DeLorenzo and Marlene S. DeLorenzo be unable to obtain the signatures of Defendants Harry DeLorenzo, Jr. and Doris C. DeLorenzo on the deed for said property, then Defendants Thomas H. DeLorenzo and Marlene S. DeLorenzo shall record a certified copy of this Judgment in the Office of Warren County Clerk, which judgment shall operate as a valid conveyance of said property.

3. Defendant High Point Sanitation Company shall make the subject property transferred from said Defendants available to the Commissioner of Environmental Protection as Receiver of High Point Sanitation Company for use in accomplishing closure of the High Point Sanitary Landfill, which may include sale of all or part of said property.

4. Defendant High Point Sanitation Company shall pay to Defendants Thomas H. DeLorenzo and Marlene S. DeLorenzo the sum of $26,092.28, the amount that they personally contributed toward the purchase of the subject property, with simple interest at an annual rate of 6% to be calculated from August 14, 1975, the date of purchase

to the date on which Defendant High Point remits the funds to said Defendants; and

5. Defendant East Penn Sanitation, Inc. a/k/a Herceg Hauling Company shall give the Commissioner of Environmental Protection or his authorized representative(s) access to all of the corporate books, records and papers for the calendar years 1983, 1984, 1985 and the first four months of 1986

/s/ Reginald Stanton
REGINALD STANTON, A.J.S.C.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION – MORRIS COUNTY
DOCKET NO. C-2156-84E
C-2154-84E

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	DECISION
vs.	:	
HIGH POINT SANITATION COMPANY, et als.	:	

APRIL 16, 1986
MORRIS COUNTY COURTHOUSE
MORRISTOWN, NEW JERSEY

B E F O R E:

THE HONORABLE REGINALD STANTON, A.J.S.C.

A P P E A R A N C E S:

DALE LASTES LESSNE, ESQ.
Attorney for Plaintiff

JOHN CORNISH
Attorney for DeLorenzo & East Penn Sanitation

DONNA L. RINALDI
CERTIFIED SHORTHAND REPORTER
LICENSE NO. 01310

THE COURT: Okay. I will turn now to the Department of Environmental Protection vs. High Point Sanitation. I see Mr. Cornish is here.

MR. CORNISH: I apologize for the lateness. I was stuck in traffic.

THE COURT: We have now the State of New Jersey through the Department of Environmental Protection versus High Point Sanitation Company and others. We have the Deputy Attorney General, Dale Lastes Lassne appearing for the State and Mr. John C. Cornish is appearing for the Defendants, Thomas and Marlene DeLorenzo and Gregory DeLorenzo and also for the East Penn Corporation.

We conducted a trial of this matter yesterday and at the end of the proofs and after hearing the arguments yesterday afternoon, I researched the matter so that I could give it some more thought overnight. I announced that I would render my decision this morning which is what I will now do.

There really is no controversy about the proofs in this action. It is clear that for a number of years up until October 26, 1983, the Defendant, High Point Sanitation Company, owned and operated a sanitary landfill on real estate located in Franklin Township, Warren County, New Jersey which is shown on the tax map of that Township as Lot 30 in Block 46. The landfill had been operated on that site since at least November of 1973 at which time the Department of Environmental Protection had issued a certificate of registration and engineering design approval to High Point for the operation of a solid waste facility at that location.

High Point Sanitation was controlled by members of the DeLorenzo family; Thomas DeLorenzo and his wife Marlene DeLorenzo and one-half of the shares of the corporation. Harry DeLorenzo and his wife, Doris E. DeLorenzo had the other half of the shares of the corporation. Initially all of the shareholders, and in particular, the two brothers, Thomas and Harry, were active in the affairs of the corporation. As time has gone on, Thomas and Harry became estranged from each other and got involved in conflicts about the management of this business and the management of other financial affairs and proved to be as years went by difficulties which had a direct impact on the ability of Hight Point Sanitation Company to continue functioning and had a direct impact on the ultimate closure of this landfill. But during most of the time which we are concerned with in this suit in terms of the property transactions, the brothers were able to cooperate in the operation of the business.

Now, in 1975 the property immediately adjacent to the High Point landfill property became available. The DeLorenzos were aware of the availability. They dealt with the persons who controlled the property. They entered into an arrangement to purchase the property. The property in question was located in generally a northern direction from the landfill and consisted of 280 acres. Of that 280 acres, 160 acres lie south of a railroad line track zoned by the Erie Lackawanna Railroad. 120 acres lay to the north of the railroad.

Now, it should be noted that once the DeLorenzos became aware of the possibility of buying 280 acres lying to the north of the landfill property, the individual

DeLorenzos had a fiduciary obligation to turn that opportunity to purchase the property over to the corporation. The corporation which was conducting the active landfill operations, the likely projection of the corporation operation was that as time went on it would need some of that land to the north to continue its landfill operation. So it seems clear to me that within the meaning of the case such as *Valley vs. North Jersey 74 N.J. 109* cited by our Supreme Court in 1977 and cases such as *Borden vs. Sinskey 530 Fed 2nd 478* decided by the Third Circuit Court of Appeals in 1976. In the meaning of cases such as those, the individual DeLorenzos have the abligation to turn this opportunity over to High Point Sanitation and give High Point Sanitation the chance to strike the deal and to acquire the property to the north.

Now, we have in this case a kind of backwards application of the doctrine of corporate opportunity. There are a large number of cases where people who are officers or directors or trusted fiduciaries of one kind or another of a corporation learn of a business opportunity for the corporation and convert it to their own private use without telling the corporation. That of course is a classic breach of fiduciary duty and one of the consequences of it can be that the deal can be ordered to be turned over to the corporation.

Now, we don't have that kind of classic breach here. It should be noted that in 1975 when the opportunity to purchase the land to the north became available, all four DeLorenzos who were simultaneously all the shareholders, all of the directors, and all of the officers of High Point Sanitation, all four of them knew. So there is no meaningful psychological sense in which the corporation

was deprived of an opportunity to buy this property with one or two people who knew about the deal, kept it to themselves and didn't turn it over to the corporation which would mean other people involved in the corporation. Everybody involved in the corporation knew about the deal. So we do not have a frustration of corporate opportunity arising out of any kind of a secretness about the deal. But we do have a kind of perversion of some of the underlying consents of the concept of corporate opportunity consisting of the fact that the deal was in fact not turned over to the corporation. Instead, corporate assets were used with the knowledge it must be said of everybody involved in the corporation to acquire the property in the names of the four DeLorenzos individually.

Now, the proofs in this case indicate that the acquisition of the 280 acres took place on August the 14th, 1975. The entity that owned the land at that time of the corporation known as Round Valley, Incorporated which had no connection with the DeLorenzos other than being an arms-length seller to them. The Round Valley on that date sold this acreage to the DeLorenzos and the deed ran to Thomas DeLorenzo and Marlene DeLorenzo, husband and wife, and to Doris E. DeLorenzo and Harry W. DeLorenzo, Jr. They are not husband and wife. They are mother and son I believe. But it went to those four DeLorenzos. The purchase price was $280,000.

Now, it is interesting to note how the purchase price was made up. How it was paid. After allowance was made for a minor tax adjustment and the least adjustment with respect to the 280,000, the net purchase price quoted to the seller was $279,948.21. That was paid as follows:

deposit of $5,000 had been paid at the time the contract was signed. That was of course applied to the purchase price. There was a purchase money mortgage–not a purchase money mortgage, there was a preexisting mortgage on the property held by James A. Stuli and Verna M. Stull, husband and wife, in the amount of $153,859.85. That mortgage was assumed by the DeLorenzos. There was a second mortage which was a purchase money mortgage running from the DeLorenzos to the sellers in the amount of a little over $51,000. There was then the amount of a little over $60,000–well, almost $70,000 which was paid in cash and which was used to pay real estate commissions to pay off some interest on the Stull mortgage and to finally pay a net cash balance of a little over $36,000 to Round Valley, Incorporated. As the years went on the Stull mortgage was very substantially reduced. It was reduced from $153,000 to something in the order of $40,000. The exact figure alludes me, but it was paid off regularly except and should have been completely paid off by now, except the last two payments have not been made.

The purchase money mortgage in the amount of $51,000 going back to Round Valley, Incorporated has been paid off in full. So that the total purchase price now has been completely paid off with the exception of the last two installments on the Stull mortgage.

Now, of all of this money the original payments, and then the continuing payments on the mortgage, all of this money came from the corporate treasury of High Point Sanitation Company. With the exception of a $26,000 which came from Harry and Marlene DeLorenzo and was used as part of the purchase price. So everything that

went to take care of this purchase price came from High Point Sanitation except for the $26,000 which represented the personal funds of Harry and Marlene DeLorenzo.

MS. LESSNE: Excuse me, your Honor, that is Thomas and Marlene.

THE COURT: That is what I meant to say. Thank you. I should have said Thomas and Marlene DeLorenzo.

Also as the years went by payments necessary for the maintenance of the property, and in particular, all of the tax payments came from the treasury of High Point Sanitation. In the early years sometimes the payments from High Point were somewhat indirect. They took the form of advancement to individuals who then paid off mortgage, either the mortgage payment or the tax. But as time went on the corporation itself directly paid all of the carrying charges on the property by sending the checks either to the mortgagee or to the tax collector. With the exception of the $26,000 which came from Thomas and Marlene DeLorenzo, everything used to purchase this property and then to reduce the mortgage and to reprepare the charges came from High Point Sanitation.

Now, there was an effort to treat the payments from High Point as loans by the corporation to the DeLorenzos. The various payments in connection with acquiring and reducing the indebtedness and paying the taxes on this property were set up on the books of High Point as loans to the DeLorenzos. Interest-free loan. So there was that effort made to treat them as loans. There were not the necessary formalities taken to have even nominally proper loans to officers and directors in the corporation.

Under the Business Corporation Act, loans such as the ones in question assuming that they were substantively justified has to be treated in a very special way by the corporation. The corporation in this State can lend money to their officers and directors, but because of the obvious risk of self-dealing and of fraud, there must be a prescribed formality loan such as these. For example, they ought to have been specifically approved in a written formal way by the shareholders of the corporation. They never were. There ought to of course have been instruments evidencing the indebtedness such as promissory notes and there never were. So there was a very substantial lack of formality and lack of attention to acquire the procedures in the way in which these so-called loans were treated.

Now, from some point of view the lack of formality is not as important here as it might be if there were shareholders in the corporation other than the DeLorenzos. The question really becomes what should be made of this situation? The State has urged that since this acquisition to the north was a corporate opportunity and since virtually all of the funds used to acquire the property, and then to carry it and to reduce the indebtedness on it came from High Point Sanitation, that the acquisition should be treated as having factually, legally and equitably made by High Point Sanitation, and this property to the north should be treated as an asset of High Point Sanitation.

The DeLorenzos on the contrary urge that the property should not be treated as such an asset or at least not all of it should be treated as such an asset. Now it becomes important to put this question into the context of

what has befallen High Point Sanitation in recent years. In the 1980s High Point Sanitation began to run out of operational space on its preexisting landfill. It began to encroach on to the 280 acres to the north which had been purchased from the Round Valley Corporation. We will call these 280 acres the Round Valley property. The DeLorenzos, in fact, started to move the landfill and its operation on to the southern portion of the Round Valley tract. In terms of property, they really ought to have done that without their having been some formal acquiescence obtained from the DeLorenzos individually as owners of the Round Valley tract, but more importantly, under the Solid Waste Management Act and some of its offshoots, they did not have the right to do that because a landfill can be operated under the statutory scheme only in a prescribed approved way.

The landfill registration which governed this landfill did not authorize the expansion of it to the north on to the Round Valley property. It came to the attention of the Department of Environmental Protection in the 1980s, I think in about 1982, that there was this encroachment to the north. The Department complained about it, eventually filed a lawsuit with respect to it and to some other environmental problems. At that point High Point Sanitation decide to regularize the situation and did make an application to the Board of Public Utilities and did make an application to the Department of Environmental Protection for formal approval of expansion of the landfill to the Round Valley property. That proposal never came to fruition for at least two reasons. One reasons was that by the time this proposal was made in 1982 and 1983, Harry DeLorenzo was not cooperating at all with his brother,

Thomas, and would not as an owner of the Round Valley property consent to any expansion of the landfill. Since the DeLorenzos individually were at least nominal owners of the property there on the face of it could not be a legal extention of the landfill because the property was not really available for use. Aside from that important property law problem, there were environmental problems as to whether it was a good idea in terms of things such as polluting underground waters. Whether it was a good idea to extend the landfill to the north. One way or another the landfill expansion never got carried forward, and indeed, the exact opposite happened because in 1983, November of 1983, there was finally an order entered to the Supreme Court which caused the landfill to be closed. I think the actual operation stopped in 1983. The legal battle continued for some time after that, but long and short of it from the fall of 1983 the active operation of the landfill came to a hault.

Thereafter, there was further proceedings in court. Some of them before me and one result of those proceedings was that in the summer of 1984, I appointed the Commissioner of the Department of Environmental Protection first as the receiver of all of the operations of the High Point Sanitation Company. It should be noted that High Point Sanitation had been carrying on really two somewhat related but still distinct businesses. It operated the landfill in question in Franklin Township. It also conducted a garbage collection business servicing roughly 8,000 homes and a number of large industrial users.

The original order that I had entered in the closure action made the commissioner the receiver of the entire

corporate entity and my original thought was that the commissioner should operate this garbage collection business to generate funds to make it possible to close the landfill in a safe way. The commissioner, however, did not think it was feasible or appropriate for him to be engaged in the operation in an unpractical way of a garbage collection business. He asked me to modify my order and to remove him from that aspect of the business and to make him the receiver of the corporation only for the purpose of closing out the landfill. I did do that in either the late summer or early fall of 1984. I modified the order, I guess it was on July 13th, 1984, I modified my order and appointed the commissioner as the receiver for the limited purpose of effectuating proper and safe closure of the landfill.

The initial plan was that the commissioner would take charge of the landfill and would physically see to its safe closing. There had been created in the recent past escrow funds of approximately $400,000 which had been generated by various fees which was available to finance the closing of the landfill. My thought was that that $400,000 would be available to the commissioner and that money would be augmented by the profits generated by the operation of the trash collection business.

Meanwhile, for environmental reasons it had been decided that the landfill itself had been closed down so that the garbage collector by the trash collection part of the business would not be disposed of, and this landfill would have to be disposed of elsewhere.

The financial problems with closing this landfill were considerable. Unfortunately, as society has a seat, we

have come rather late in time to appreciate how complicated it is to close a landfill in a safe way. There are enormous technical problems. For example, to close this landfill in an environmentally safe way requires among other things the construction of a clay cap across the landfill. Just the construction and installation of that cap will cost something on the order of $5 million. Several million additional dollars will be needed for drainage facilities and monitoring wells and other devices that are needed in connection with the closure of this landfill. So the closure of the landfill is an extraordinary expense and to finance that closure we had only the $400,000 in the escrow fund, plus whatever profits the collection business might generate.

As events develop, the collection business has basically not generated any profits to add to help with the closing of the landfill. There has been a modest amount of money, $10,000, generated by the sale of a relatively minor property, the Gruber property owned by High Point. The language and short of it is that the commissioner as receiver of this corporation with responsibility of closing the landfill, has to confront something like $8 million in expenditures, and he has only a little over $400,000 available from funds generated by the corporation. So there is a very subtantial shortfall which will probably have to be made up from public funds.

Meanwhile, the commissioner has become aware of the circumstances surrounding the acquisition of the Round Valley property to the north, and the commissioner wants that Round Valley property to be declared to be an asset of the corporation. Declaring as an asset of the corporation would be pragmatically beneficial to the

commissioner with respect to his responsibility in closing the landfill in two ways. A portion of the Round Valley property needs to be used physically in connection with the closing of the landfill. That is a relatively small portion of the property. Over and above that physical need having this property available would be an economic resource because of the portion of the property at least could be sold on the commercial market and would generate funds which could then be applied to the closure of the landfill. We know that the most recent appraisal of the property made in 1981 shows a value of something like $320,000. Once generally experienced with the rapid inflation of real estate values in Northern New Jersey in recent years would lead one to suspect, although we don't have solid proof of it, that the value of the property is substantially now in excess of $320,000 because of the general inflation of real estate market value. In any event, it is clear that the 280 acres are valuable and that declaring them to be an asset of the corporation would be helpful to the commissioner and in fulfilling his responsibilities to close the landfill in a sanitary and safe way.

Now, the question may be helpful but doesn't solve the case, the fact that it is helpful doesn't mean the commissioner is entitled to relief in which he is seeking. I have concluded that, however, the relief should be granted. It seems clear to me that this tract to the north of the landfill was a corporate opportunity and that the corporation ought to have acquired it and ought to have used it in connection basically with the operations.

Now, I suppose that theoretically the corporation in an informed and proper way might have declined to take advantage of this opportunity and might have permitted

the DeLorenzos individually to take advantage of this opportunity. But of course, the exact opposite of that happened. What happened was that corporate fund was used to acquire this land, but the title to the land was land formally placed in the names of the individual DeLorenzos. To do that was a decided wrong to the corporation. It might be argued that the wrong was only a technical one since the DeLorenzos who took the title were also all of the shareholders of the corporation, but that overlooks the fact that the corporation had interests which were not simply reducible to the interests of its individual shareholders.

The corporation at the time this purchase was made in 1975 was engaged in the business of operating a sanitary landfill among other businesses. That business was one which had important public implications to it. The basic Solid Waste Management Act of this State had been adopted in 1975, and it is clear that a sanitary landfill at that time had substantial responsibility towards the public in terms of attempting to put itself in a financial position to operate the landfill in an environmental sound way. Also to close the landfill in an environmental sound way as if filled up.

A landfill company simply had no business or right to use its resources in a way which was flatly counterproductive to which responsibilities to be in a position to close the landfill in an environmentally sound way. So that what we really had here was a corporation with enormous responsibilities in terms of closing, operating this landfill and then eventually closing it with enormous long-range financial obligations with respect to those operations and that closure. We had it depriving itself of

significant assets which might make it possible to discharge the responsibility in the corporation simply had no right to do that. The individual DeLorenzos had no right to do that.

Now, I think it has to be said that in fairness that this was in a swindle that the DeLorenzos were engaged in. Although they were sloppy in their mechanical procedures, they were always open and aboveboard about what they were doing. I think it is also clear that they did in fact intend that at least the-160 acres south of the railroad would be given to the landfill company and would be available both physically and in terms of economic value to the operations of a landfill company and to the eventual closure of the landfill. So there was not a conscious desire or intent on the part of any of the DeLorenzos to cheat the public or cheat the State or cheat the corporation, but what there really was was a diversion of assets away from the corporation at a time when the corporation needed every last asset it could get if it was to have a ghostly chance of fulfilling its responsibilities to operate and then close this landfill in a proper way. Given all that it seems to me that it is imperative in terms of legal sound policies, in terms of equitable fairness, in terms of requiring corporations and individuals who are involved in the operation of a sanitary landfill to meet their responsibilities to the public. It is imperative that this acquisition be treated as belonging to the corporation and considering the fact that almost all the funds were corporate funds, it is obviously imminently fair to do that.

It was suggested by Mr. Cornish that perhaps a fair solution to this problem might be to take the 160 acres to

the south of the railroad track and put them into the corporation and let the DeLorenzos individually keep the 100 or so, 120 acres or so north of the tract. There is something to be said for that on the theory that in physical terms the 120 acres to the north aren't useful to the closing of the landfill. There is no need to construct any cap on those acres or any portion of them. There is no need to have monitoring wells. There is no need to have special drainage systems. There is no particularly valuable soil on the northern 120 acres in terms of having soil available for filling the closing of the landfill. But in terms of the general economics of this situation, those 120 acres will generate funds and can generate funds which are sorely needed to close this landfill. As I previously indicated, there is a shortfall of a very large amount. Probably six or seven or $8 million that is involved here. We don't know yet the full amount that it is going to take to close the landfill, but the present indications in cases that have been previously tried here indicate that something on the order of $8 million at least will be needed and perhaps more. Even at today's inflated values, this land to the north, all of it collectively, won't come close to closing that shortfall, but something is better than nothing. So having the proceeds of the sale of a portion of this land will be helpful.

So the economics of the situation indicate that the corporation needs the benefit of a sale of lands to the north of the railroad and the way in which corporate funds were used to purchase all of the land including the 120 acres north of the railroad makes it fair insofar as the DeLorenzos are concerned to require all of the land to be treated as a corporate asset.

So the judgment in this case will require the DeLorenzos individually to convey all of their interest in the entire Round Valley tract on the corporation, and it will then require the corporation to make that asset available to the commissioner in terms of his closing out the landfill. Because of the determination I have made with respect to the ownership of the Round Valley tract, there is no need to deal with setoff questions. The proofs in this case indicate that over the years soil from the Round Valley tract was used on the corporate tracts to the south, and there were paper transactions under which the corporation was charged for that soil. Since the corporation was beneficially the owner of the tract, there is no need for such an offset, but I note that my decision in this case does involve the concept, and from the very beginning the corporation equitably was the owner of the entire tract. So going back to the time of the purchase in 1975, this corporation equitable was the owner of the Round Valley tract because from the very beginning most of the funds used to purchase the tract came from the corporation.

Now, it is noted that Thomas and Marlene DeLorenzo did put up $26,000 for the original purchase, and in fact, the exact sum is $26,092.28. It seems to me that they are entitled to get that money back. To get it back at an interest which is sufficient to represent at least passbook interest and perhaps a little bit more than that. I will require the commissioner as a condition or I will require the corporation as a condition of taking this property back to repay to Thomas and Marlene DeLorenzo the sum of $26,092.28 plus interest at the simple rate of six percent from August 12, 1975, the date of the original purchase

up until the time in which the money is paid back. That will recognize the fact that Thomas and Marlene DeLorenzo have again some funds and those funds have ended up benefiting the corporation now that it owns that asset.

There is another point at issue in this case. It doesn't deal with the landfill as such. It is quite a separate and distinct matter. That regards the request of the commissioner to have access to the books and records of the East Penn Sanitation, Incorporated. East Penn Sanitation, Incorporated is a Pennsylvania corporation which does some business in New Jersey. Some in Pennsylvania. Its shares are owned entirely by Gregory DeLorenzo who is the son of Thomas and Marlene DeLorenzo. It should be noted that High Point Sanitation Company continues to be in the garbage hauling and collection business. It still has a sizable number of customers in Northern New Jersey, both residential and industrial. It collects from sites in Northern New Jersey and deposits its collection ultimately in a landfill near Scranton, Pennsylvania. It uses as its base of operation from most of its physical operations a site in Nazareth, Pennsylvania which it shares with East Penn Sanitation, Incorporated. So the two corporations own or lease, I am not sure whether they own or lease it, a site in Nazareth, Pennsylvania. They conduct operations there. Each company does. They use that as a place for storing trucks, for transferring collections, breaking them down and transferring them. Some for recycle purposes, and some for hauling to the Scranton, Pennsylvania landfill.

The proofs in this case indicate to me that the two corporations, East Penn Sanitation, Incorporated and

High Point Sanitation Company, are probably being run in a properly separate way. The accountant, Mr. Yetter, indicated that there are completely separate books and records. The assets basically are separately set up an accounted for and operated. The impression I have is that there is probably nothing wrong with the way in which the corporations are conducting their respective business. However, the commissioner is fearful that there may be some diversion on resources from High Point to East Point Sanitation. There is some indication that there may be a diversion of resources on one occasion. One or two employees of High Point were found to be operating or repairing East Penn Sanitation equipment, and that on its face is a diversion of a kind.

On the other hand, there is testimony in this case that East Penn ofter has its employees help High Point with certain work. Now, there is of course nothing wrong with the corporations helping each other out. There is nothing wrong with employees from one corporation assisting in the operations of another. There is nothing wrong with it in principal provided that appropriate account is taken of it and appropriate credits are given back and forth, provided that there is not a net diversion of resources from High Point to East Penn Sanitation. The impression I have from the proofs in this case is that if there is any net diversion of resources, it is probably the other way around. It is probably East Penn sources that are being used to subsidize to some extent the operations of High Point, and that is not something in which the commissioner can really complain. Although, perhaps people interested in East Penn might complain. The point, however, so far as this present action is concerned that the

commissioner, it seems to me is entitled to know the facts. Even if the facts turn out to be completely harmless and completely exonerated. There is a kind of interconnection between the corporations. They are in related businesses. They occupy in part the same site. They collaborate in a number of their activities. There has been some cross-usage of personnel and given all that, it seems to me the commissioner is entitled to be properly informed as to the accounting procedures and as to the operational procedures of each corporation.

I will therefore as part of the judgment direct that the defendant use East Penn Sanitation, Incorporated, give access to the commissioner to its books for the years 1983, 1984, 1985, and currently in 1986 up to the present time. So I will direct that. I think that disposes of all the questions at issue.

Is that something that I have not disposed of?

MS. LESSNE: No, your Honor.

THE COURT: Mr. Cornish?

MR. CORNISH: One question, your Honor. We have two defendants that have defaulted in this matter. Harry DeLorenzo, Jr. and Doris. I know your Honor wants us to prepare a deed from the individual defendants to High Point Sanitation. That may be somewhat difficult on behalf of, not on my end by virtue of Marlene and Thomas, but on behalf of other defaulting defendants. I wonder whether your Honor would instead of a deed want to record the judgment or something to that effect.

THE COURT: Let the judgment provide that the deed is to be delivered by the individual defendants no

later than 30 days after the date of the judgment. If that is not done then the judgment shall provide that a copy of it may be recorded in the office of the Warren County Clerk and it will then operate its conveyance to the property.

MR. CORNISH: The second thing, your Honor, I believe held that the corporation, High Point Sanitation, in fact did own this property from August the 14th, 1975 on. Is that your Honor's finding?

THE COURT: Yes.

MS. LESSNE: Your Honor, you just said that the copy of the deed should be recorded in the office of the Warren County Clerk in lieu of transferring a deed?

THE COURT: What the judgment will do is in the first instance direct that the deed be given and I suppose that Thomas and Marlene will do that. It is better and cleaner from title points of view to have a deed. It is not essential but if the deed is not forthcoming or if a complete deed is not forthcoming from all of the defendants, then the judgment may be recorded, a certified copy of it may be recorded in the office of the Warren County Clerk. The judgment will then operate as a conveyance of the property.

All right, fine. I want to thank both Mr. Cornish and Miss Lessne for an effective presentation of the case. You both did a fine job. The exhibits are on the table in front of me. I will return all of them to Miss Lessne. Thank you.

(Whereupon the decision is concluded.)

* * *

CERTIFICATE

I, DONNA L. RINALDI, a Notary Public and Certified Shorthand Reporter of the State of New Jersey hereby certify that the foregoing is a true and accurate transcript as stenographically taken by me.

/s/ Donna L. Rinaldi, CSR
DONNA L. RINALDI
OFFICIAL COURT REPORTER
MORRIS COUNTY
COURTHOUSE
CERTIFICATE NO. 1310

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4693-85T8
(Filed Dec 15, 1987)

STATE OF NEW JERSEY, DEPARTMENT
OF ENVIRONMENTAL PROTECTION,

Plaintiff-Respondent,

v.

HIGH POINT SANITATION COMPANY,
THOMAS H. DeLORENZO, MARLENE
DeLORENZO, HILLS OF WARREN
AND EAST PENN SANITATION,
a/k/a HERCEG HAULING CO.,

Defendants-Appellants,

and

HARRY DeLORENZO, JR. and
DORIS DeLORENZO,

Defendants.

- -

TOWNSHIP OF FRANKLIN,

Plaintiff,

v.

HIGH POINT SANITATION CO., INC.,
HARRY DeLORENZO, THOMAS DeLORENZO,
AND GREG DeLORENZO,

Defendants.[1]

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[1] Appellants' Notice of Appeal does not identify all appellants who are appealing, by particularity. It refers only to "Thomas H. DeLorenzo, Marlene S. DeLorenzo, A partnership of NJ, et al." Appellants' brief cover refers to the plaintiff and

(Continued on following page)

Submitted November 16, 1987 – Decided DEC 15 1987

Before Judges J.H. Coleman, Havey and Stern.

On appeal from the Superior Court, Chancery Division, Warren County.

Rubin, Dolgoff & Romanacce, attorneys for appellants (George L. Romanacce, on the brief).

W. Cary Edwards, Attorney General, attorney for respondent (Michael R. Clancy, Deputy Attorney General, of counsel; Dale Laster Lessne, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Commissioner of Department of Environmental Protection, as receiver of High Point Sanitation Company, sought a declaration that certain land, known as the Round Valley property, be declared assets of High Point so that a portion of the property could be used in connection with closure of the High Point landfill and a portion could be sold to "generate funds which could then be applied to the closure of the landfill." Defendants Thomas Marlene DeLorenzo and the Hills of Warren partnership appeal from portions of a judgment entered on

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(Continued from previous page)

defendants, without identifying which defendants are appellants. Equally incorrectly, the respondent's brief refers to all defendants as appellants, whereas it is clear that neither Harry DeLorenzo, Jr., nor Doris C. DeLorenzo are appellants. We have identified the appellants in the caption, and have used the caption on the Amended Verified Complaint, Judgment and subsequent order of June 26, 1986, entered in aid of litigant's rights, and have amended same to distinguish between the defendants who are appealing, and those who are not.

May 3, 1986 requiring defendants Thomas and Marlene DeLorenzo and Doris and Harry DeLorenzo, Jr., shareholders of High Point, to convey the Round Valley property which they owned as individuals or as partners of the Hills of Warren, to High Point and directing defendant High Point to "make the subject property transferred from said Defendants available to the Commissioner of Environmental Protection as receiver of High Point Sanitation Company for use in accomplishing closure of the High Point Sanitary Landfill."[2]

In his oral opinion of April 16, 1986, Judge Stanton expressly found that there was no "classic breach of fiduciary duty" because all the shareholders of High Point knew of, and participated in, the purchase of the Round Valley property. Judge Stanton found that " . . . we have in this case a kind of backwards application of the doctrine of corporate opportunity." However, Judge Stanton also found:

> Now, of all of this money the original payments, and then the continuing payments on the mortgage, all of this money came from the corporate treasury of High Point Sanitation Company. With the exception of a $26,000 which came from [Thomas] and Marlene

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[2] Harry DeLorenzo, Jr. was acknowledged to be a partner of the Hills of Warren partnership and/or an individual owner of the Round Valley property. The record is not clear as to when he became a shareholder of High Point Sanitation or if he replaced his father in that capacity when Harry. Sr. and Thomas, both active in High Point, had a "falling out." Harry DeLorenzo, Sr. was not a party to this litigation, and Harry, Jr. and his mother, Doris, did not appear. The complaint, however, alleged, and the answer admits, that Harry, Jr. was a 25% shareholder of High Point.

> DeLorenzo and was used as part of the purchase price. So everything that went to take care of this purchase price came from High Point Sanitation except for the $26,000 which represented the personal funds of [Thomas] and Marlene DeLorenzo.
>
> * * *
>
> . . . But as time went on the corporation itself directly paid all of the carrying charges on the property by sending the checks either to the mortgagee or to the tax collector. With the exception of the $26,000 which came from Thomas and Marlene DeLorenzo, everything used to purchase this property and then to reduce the mortgage and to reprepare the charges came from High Point Sanitation."

Irrespective of whether the initial purchase of the Round Valley property was designed to benefit High Point or its shareholders as individuals, and irrespective of whether the "corporate opportunity" doctrine strictly applies, we are satisfied, particularly in light of the use of High Point assets to purchase and maintain the property, that the record fully supports Judge Stanton's findings and conclusions. Based on those findings, the individual defendants' contention that they were unconstitutionally deprived of their property must be rejected. Judge Stanton expressly directed that Thomas and Marlene DeLorenzo be paid the sum of $26,092.28, the amount they contributed, as individuals, towards the purchase. Interest was also awarded.

Accordingly, the judgment is affirmed substantially for the reasons expressed by Judge Stanton.

SUPREME COURT OF NEW JERSEY
A-53 September Term 1988
28,226

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff-Respondent, v. HIGH POINT SANITATION COMPANY, etc., et al., Defendants, and THOMAS H. DeLORENZO, et al., Defendants-Appellants.	O R D E R (Filed Dec 23, 1988)

This matter having been duly considered and the Court having determined that certification was improvidently granted;

It is ORDERED that the within appeal be and hereby is dismissed.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 19th day of December, 1988.

/s/ Stephen Townsend
Clerk

Supreme Court, U.S.
FILED
MAY 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1571

In The

Supreme Court of the United States

October Term, 1988

THOMAS H. DE LORENZO, MARLENE S. DE LORENZO AND HILLS OF WARREN,

Petitioners,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari To The New Jersey Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petition for a Writ of Certiorari should be denied because the state court decision holding that title to the "Round Valley" property be transferred to High Point Sanitation Company from the corporate shareholders, officers and directors individually rested on adequate and independent state grounds and did not implicate petitioners' federal and state constitutional rights.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Jurisdictional Statement 2

Statement of the Case 2

Argument

The Petition for a Writ of Certiorari Should be Denied Because the State Court Decision Holding That Title to the "Round Valley" Property be Transferred to High Point Sanitation Company from the Corporate Shareholders, Officers and Directors Individually Rested on Adequate and Independent State Grounds and Did Not Implicate Petitioners' Federal and State Constitutional Rights 9

Conclusion 16

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Hillman, 296 *U.S.* 222, 56 *S.Ct.* 204, 80 *L.Ed.* 192 (1935) 13

Black v. Cutter Laboratories, 351 *U.S.* 292, 76 *S.Ct.* 824, 100 *L.Ed.* 1188 (1956) 11

Bonelli Cattle Co. v. Arizona, 414 *U.S.* 313, 94 *S.Ct.* 517, 38 *L.Ed.2d* 526 (1973) 14

Cona v. Gower, 89 *N.J. Super.* 510 (Ch. Div. 1965) 13

Hammerstein v. Superior Court of California, 341 *U.S.* 491, 71 *S.Ct.* 820, 95 *L.Ed.* 1135 (1951) 10

Herb v. Pitcairn, 324 *U.S.* 117, 65 *S.Ct.* 459, 89 *L.Ed.* 789 (1945) 11

Hughes v. State of Washington, 389 *U.S.* 290, 88 *S.Ct.* 438, 19 *L.Ed.2d* 530 (1967) 14

Independent Wireless Telegraph Co. v. Radio Corp. of America, 269 *U.S.* 166, 46 *S.Ct.* 459, 70 *L.Ed.* 357 (1925) 13

Nollan v. California Coastal Comm'n, ___ *U.S.* ___, 107 *S.Ct.* 3141, ___ *L.Ed.2d* ___ (1987) 14

Orland Properties, Inc. v. Broderick, 94 *N.J. Super.* 307 (Ch. Div. 1967) 13

Roberts v. Roberts, 106 *N.J. Super.* 108 (Ch. Div. 1969) 13

Robinson v. Ariyoshi, 441 *F. Supp.* 559 (D. Hawaii 1977), aff'd., 753 *F.2d* 1468 (9th Cir. 1985), vacated on other grounds, 477 *U.S.* 902 (1986) 15

Sotamura v. County of Hawaii, 460 *F. Supp.* 473 (D. Hawaii 1978) 15

Zacchini v. Scripps-Howard Broadcasting Co., 433 *U.S.* 562, 97 *S.Ct.* 2849, 53 *L.Ed.2d* 965 (1977) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 *U.S.C.* §1257 ..... 2, 10

N.J.S.A. 13:1E-1 *et seq.* 3

N.J.S.A. 13:1E-9(d) 12

N.J.S.A. 13:1E-100 *et seq.* 3

N.J.S.A. 14A:14-4(1) 12

No. 88-1571

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THOMAS H. DE LORENZO, MARLENE S. DE LORENZO AND HILLS OF WARREN,

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vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For A Writ Of Certiorari To The New Jersey Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, State of New Jersey, Department of Environmental Protection, respectfully prays that this Court deny the Petition for a Writ of Certiorari because the state court judgment was based on independent and adequate state grounds and did not implicate petitioners' federal or state constitutional rights.

JURISDICTIONAL STATEMENT

Invoking federal jurisdiction under 28 *U.S.C.* §1257, the petitioners are seeking to have this Court review the judgment of the New Jersey Supreme Court. That court never rendered a decision on the merits of this case because it dismissed the appeal upon determining that certification had been improvidently granted. Therefore, petitioners are actually seeking review in this Court of the judgment of the Appellate Division of the Superior Court of New Jersey. The final decision of the Appellate Division was based upon adequate state grounds, independent of the federal issue that petitioners unsuccessfully asserted below. Thus, this Court lacks jurisdiction to grant the petition for *certiorari*.

STATEMENT OF THE CASE

This appeal stems from a 1986 decision of the Chancery Division of the New Jersey Superior Court, which held that a property that had been purchased and maintained primarily with corporate funds, but where title had been placed in the names of the individual corporate shareholders, officers and directors, was equitably an asset of the corporation and that title be transferred to the corporation forthwith. (App. 5)* Petitioners Thomas H. De Lorenzo and Marlene S. De Lorenzo** are two of the

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* Hereinafter respondent shall refer to the appendix to the petition for writ of *certiorari* as "App."

** Hereinafter respondent shall refer to petitioners Thomas H. De Lorenzo, Marlene S. De Lorenzo and Hills of Warren as the "De Lorenzos."

shareholders, officers and directors of High Point Sanitation Company ("High Point"), a New Jersey corporation that owns and formerly operated a sanitary landfill and solid waste hauling business in that state. (App. 7). The sanitary landfill ceased accepting solid waste in October 1983 after the NJDEP rejected High Point's plan for expansion of operations onto adjacent vacant land, commonly referred to as the "Round Valley" property. The NJDEP directed High Point to immediately commence proper closure activities at the landfill in accordance with the New Jersey Solid Waste Management Act ("SWM Act"), *N.J.S.A.* 13:1E-1 *et seq.*, and the New Jersey Sanitary Landfill Facility Closure and Contingency Fund Act, ("Closure Act"), *N.J.S.A.* 13:1E-100 *et seq.*

In May 1984 the NJDEP filed suit to compel High Point to comply with its statutory obligations and begin closure activities. After a plenary hearing, the Chancery Court found High Point liable under the SWM Act and the Closure Act for the proper closure of its landfill. The trial court determined that High Point's president, Thomas De Lorenzo, had proven unreliable to carry out the closure activities and appointed NJDEP Commissioner Robert E. Hughey to be receiver of the corporation to close the landfill and continue operating the hauling business. Commissioner Hughey immediately sought a modification of the Court's ruling and requested that he be appointed receiver only for the purpose of supervising the proper closure of the landfill. The trial court so modified its decision.

The Commissioner as Receiver was given custody of a parcel of land owned by High Point to be sold if

necessary to raise the monies needed for closure.* He was also awarded custody of the Company's earth-moving equipment to aid in accomplishing the closure. He was also given access to High Point's two statutorily-required escrow accounts specifically established for closure expenses. The Commissioner was permitted to review the Company's books and records. Thomas De Lorenzo was permitted to continue managing the solid waste hauling business for which he was allowed access to the corporate bank accounts and any equipment needed for operations. The trial court hoped that the hauling business would generate profits to be used to meet High Point's statutory liability for closing its landfill.

A review of High Point's books and records by NJDEP revealed that the Company had advanced several hundred thousand dollars to the Hills of Warren, a general partnership comprised of the four De Lorenzos, High Point's shareholders, officers and directors, for the purpose of purchasing the "Round Valley" property for $280,000. Further investigation by NJDEP disclosed that, but for $26,000 that had been contributed by Thomas and Marlene De Lorenzo personally, the corporation had provided the initial deposit of $5,000 for the purchase and had "loaned" Hills of Warren approximately $74,000. High Point had also furnished the funds for the monthly payments on two mortgages, one taken by the De Lorenzos individually and one taken by Hills of Warren. (App. 9 to 11). In addition, the Company had paid the

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* This property was subsequently sold and the net proceeds of the sale turned over to the receiver to use towards the landfill closure.

municipal property taxes on the 280 acre parcel since the purchase in 1975. This was reflected on the corporate financial statements as "real estate expenses."

A portion of the monies furnished by High Point for the "Round Valley" property was reflected on the corporate balance sheets as "Assets – Other Accounts Receivable" and remained unchanged at $200,912.90 at least from the time of the Receiver's appointment in mid-1984. None of the De Lorenzos or the Hills of Warren ever executed any note or any other type of debt instrument to formalize the "loans" made by High Point. (App. 11). The directors never formally approved the loan for the purchase of the "Round Valley" property at a meeting, nor did they ever pass a resolution to that effect. (App. 11).

Upon learning of the circumstances behind the "Round Valley" purchase, the NJDEP moved for and was granted leave to amend its complaint to add Thomas H. De Lorenzo, Marlene S. De Lorenzo, Doris De Lorenzo, Harry De Lorenzo, Jr., the Hills of Warren and East Penn Sanitation Company* as defendants. Respondent sought to have the "Round Valley" property declared an asset of High Point.

After conducting a trial, the court declared, based on the afore-described circumstances surrounding the

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* East Penn Sanitation Company, a Pennsylvania corporation established by Thomas and Marlene De Lorenzo to conduct solid waste transfer and hauling activities primarily in Pennsylvania, was named defendant in order for the NJDEP to gain access to review the corporate books and employment records, an issue that is unrelated to the issue in the instant appeal.

purchase, the "Round Valley" property to be an asset of High Point and ordered all four De Lorenzos and the Hills of Warren to immediately convey their interests in the property to the corporation by delivering the deed by May 16, 1986.* (App. 21). The trial court determined that, as High Point's shareholders, directors and officers, the De Lorenzos had breached their fiduciary duty to the corporation by acquiring the "Round Valley" property for themselves and not turning over the opportunity to purchase the property to High Point, especially since it was likely that the landfill would need the additional adjacent land in order to expand its operations. (App. 7 to 8). Since all of the corporate shareholders, officers and directors were aware of the opportunity to purchase the property, there was no breach of a fiduciary duty in the classic sense, but rather a situation where corporate assets had been wrongfully used to acquire the property in the names of the De Lorenzos individually (App. 8 to 9). The court found that there was a "substantial lack of formality and lack of attention to . . . the procedures in the way in which these so-called loans were treated." (App. 12).

In light of differences between the corporation's interests and its shareholders' interests and the company's involvement in an industry with "important public implications," the court determined that High Point should not have deprived itself of significant assets which it would need both to continue operating the landfill and to close it properly when it reached capacity.

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* Default judgments were entered against Doris De Lorenzo and Harry De Lorenzo, Jr. as they filed no responses to the amended verified complaint.

(App. 18 to 19). The trial court therefore concluded that it was equitably fair and necessary to treat the purchase as belonging to High Point given the Company's duty to the public and its contribution of nearly all of the funds for the purchase and maintenance of the "Round Valley" property. (App. 19). The proceeds of the sale of all or a portion of the property would be used to contribute to the funds needed to properly close the landfill, which would cost approximately six to eight million dollars.

> [T]he corporation needs the benefit of a sale of [the] lands . . . and the way in which corporate funds were used to purchase all of the land . . . makes it fair insofar as the De Lorenzos are concerned to require all of the land to be treated as a corporate asset. [App. 20].

High Point was ordered to make the property available to the Receiver to assist in the landfill closure, the cost for which High Point had already been found to be statutorily liable. The NJDEP was directed to pay Thomas and Marlene De Lorenzo the $26,000 they had personally contributed toward the "Round Valley" purchase plus simple interest to be computed from the date of purchase (App. 20 to 21). Judgment was entered on May 3, 1986. (App. 1).

Soon thereafter the NJDEP sought relief from the trial court for the defendants' failure to comply with the terms of the judgment. The court directed that title be conveyed to High Point by the filing of the certified copy of the judgment with the County Clerk's Office and restrained the corporation from selling, transferring or in any way disposing of the property until the appeal was concluded.

Defendants De Lorenzo, Hills of Warren and East Penn challenged the decision in the Appellate Division of the New Jersey Superior Court, which affirmed the trial court in an opinion *per curiam* on December 5, 1987 (App. 27). The appellate court essentially relied on the extent to which High Point had contributed to the purchase and maintenance of the "Round Valley" property, disregarding the issues concerning the initial purpose for acquiring the land and the strict applicability of the corporate opportunity doctrine. The appellate court found that the trial record amply supported the lower court's findings and conclusions. Finally, the Appellate Division rejected appellants' claim of unconstitutional deprivation of property since the trial court decision provided for "the corporation as a condition of taking this property back to repay to Thomas and Marlene De Lorenzo the sum of $26,092.28 plus interest." (App. 21).

The petitioners then filed both a notice of petition for certification and a notice of appeal with the New Jersey Supreme Court. Upon consideration of all of the papers filed by both parties and after hearing oral argument by counsel, on December 19, 1988 the New Jersey Supreme Court dismissed the appeal, having determined that certification had been improvidently granted. (App. 31).

Petitioners filed a petition for writ of *certiorari* to the New Jersey Supreme Court with this Court on or about March 23, 1989. Respondent respectfully submits the within brief in opposition thereto.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURT DECISION HOLDING THAT TITLE TO THE "ROUND VALLEY" PROPERTY BE TRANSFERRED TO HIGH POINT SANITATION COMPANY FROM THE CORPORATE SHAREHOLDERS, OFFICERS AND DIRECTORS INDIVIDUALLY RESTED ON ADEQUATE AND INDEPENDENT STATE GROUNDS AND DID NOT IMPLICATE PETITIONERS' FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

The issue that was decided by the trial court and affirmed by the Appellate Division was whether the "Round Valley" property should be declared to be an asset of High Point in light of the substantial contributions of the corporation to the purchase and subsequent maintenance of the property, as well as the minimal participation of its record owners, who were the corporate shareholders, officers and directors. Of critical importance to this case is the fact that title in the property was ordered transferred to *High Point*, not to the State, as petitioners contend. The only role that the NJDEP Commissioner may play is to sell all or part of the land to obtain the funds needed for the closure of the corporation's landfill, the specific task for which the Receiver was appointed. Proper closure is an obligation of the corporation and will be accomplished as much as possible by the expenditure of corporate funds.

Petitioners now raise the issue before this Court that their private property was taken for public use without

just compensation or due process of law.* The trial court decision is silent on this issue. The Appellate Division, however, expressly rejected petitioners' claim that they were unconstitutionally deprived of their property because the trial court had found that the subject property was in equity an asset of the corporation, "particualarly in light of the use of High Point assets to purchase and maintain the property." (App. 30).** The trial court judgment provided for reimbursement to Thomas and Marlene De Lorenzo for the amount of their contribution to the property's purchase plus interest. The Appellate court was satisfied "that the record fully supports Judge Stanton's findings and conclusions" regardless of the

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* If the trial court had appointed a private citizen to be receiver of High Point for the purpose of supervising the landfill closure, the petitioners would be hard pressed to raise the taking issue since only private parties would be involved. However, the selection of the NJDEP Commissioner as the receiver for High Point prompted petitioners to erroneously claim that a taking by the State had occurred in spite of the fact that title to the "Round Valley" property was transferred to the *corporation*, and not to the State. Irrespective of whether the receiver is a public or private citizen, his duties remain the same and do not implicate federal constitutional rights.

** Since the New Jersey Supreme Court dismissed petitioners' appeal "having determined that certification was improvidently granted" (App. 31), that order is not ordinarily a judgment which is reviewable under 28 *U.S.C.* §1257, and the reviewable judgment is that of the highest court possessing and exercising jurisdiction, which in this case is the Appellate Division of the New Jersey Superior Court. *Hammerstein v. Superior Court of California*, 341 *U.S.* 491, 492, 71 *S. Ct.* 820, 821, 95 *L.Ed.* 1135 (1951).

purpose for which the "Round Valley" property was originally purchased or the strict applicability of the "corporate opportunity" doctrine. (App. 30).

This Court may only correct state court judgments to the extent that they incorrectly adjudge federal rights. It has been the practice of this Court not to review state court judgments that rest on adequate and independent state grounds. *Herb v. Pitcairn*, 324 *U.S.* 117, 125-126, 65 *S.Ct.* 459, 462-463, 89 *L.Ed.* 789 (1945); *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 *U.S.* 562, 566, 97 *S.Ct.* 2849, 2852, 53 *L.Ed.*2d 965 (1977). In *Black v. Cutter Laboratories*, 351 *U.S.* 292, 298, 76 *S.Ct.* 824, 827, 100 *L.Ed.* 1188 (1956), this Court declined to consider federal questions that were discussed in the opinion of the highest state court but where the judgment rested on adequate state grounds. Even if a decision is ambiguous, this Court has chosen to avoid an interpretation that would involve a constitutional question. *Id.* at 299, 76 *S.Ct.* at 828, 100 *L.Ed.* at 1197.

In the instant case the Appellate Division's judgment clearly rested on state common law principles. Only the details of High Point's participation in the purchase and maintenance of the "Round Valley" property and a brief reference to the "corporate opportunity" doctrine are addressed in the decision *per curiam*. The court below thus relied solely on state grounds in reaching its conclusion and gave short shrift to petitioners' baseless constitutional claims.

The state court decisions in this case have merely transferred title to the subject property from petitioners to another private party, High Point, for a private use – to

help satisfy the corporation's statutory obligation for the closure of its landfill. The land was not taken by the NJDEP for any type of public use, nor was it regulated to inutility. Therefore, petitioners' writ is most definitely without merit factually and legally.

In the instant case, the trial court appointed the NJDEP Commissioner as Receiver of High Point pursuant to a specific provision in the SWM Act, *N.J.S.A.* 13:1E-9(d). He was not granted any of the authority of a receiver in an insolvency case,* but was only assigned the specific task of supervising the closure of High Point landfill, an activity for which the corporation was and is still financially liable. The appointment of a receiver in no way absolved the company of closure liability. In fact, it was the trial court's initial hope that the Company's solid waste hauling business would contribute its net profits to the closure expenses. The NJDEP Commissioner as Receiver was merely standing in the shoes of High Point by being awarded custody of "Round Valley" and permitted to sell all or any portion thereof to obtain the necessary funds for closure in satisfaction of the Company's obligations.

Petitioners' claim that the state court ruling resulted in their property being awarded to the State without just compensation or due process in violation of their federal constitutional rights is completely without merit. Firstly, as has been discussed earlier, title to the "Round Valley" property was transferred to *High Point* and not to the

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* See Section 4 of the New Jersey General Corporation Act, *N.J.S.A.* 14A:14-4(1).

NJDEP or the State. The NJDEP Commissioner was only given *custody* of the real estate in regard to fulfillment of his assigned task to supervise the closure of the High Point landfill, the closure of which had years before been determined as the corporation's statutory responsibility.* Thus, the Receiver was acting for High Point in accomplishing the closure.

Secondly, the decision to require the transfer of the "Round Valley" property to High Point was based on time-honored equitable principles. The original suit by NJDEP against High Point was filed in the Chancery division of the New Jersey Superior Court to enforce the SWM Act and the Closure Act. Equity will not suffer a wrong without a remedy. This is the "very foundation of equity." *Roberts v. Roberts*, 106 *N.J. Super.* 108, 109 (Ch. Div. 1969) See also *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 *U.S.* 166, 171, 46 *S.Ct.* 459, 472, 70 *L.Ed.* 357, 364 (1925), *Orland Properties, Inc. v. Broderick*, 94 *N.J. Super.* 307, 313-314 (Ch. Div. 1967) and *Cona v. Gower*, 89 *N.J. Super.* 510, 516 (Ch. Div. 1965). Courts of equity are endowed with the flexibility to adapt proceedings and remedies to the circumstances of each case. *Alexander v. Hillman*, 296 *U.S.* 222, 239, 56 *S.Ct.* 204, 209-210, 80 *L.Ed.* 192, 199 (1935).

By ordering the transfer of title to High Point, the trial court was fashioning the appropriate remedy for an obvious wrong. The judge noted that

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* No appeal was taken by either High Point or any of the De Lorenzos from the Order Appointing Receiver in 1984.

> going back to the time of the purchase in 1975, this corporation equitable [sic] was the owner of the Round Valley tract because from the very beginning most of the funds used to purchase the tract came from the corporation. [App. 21].

By so ruling, the court took full advantage of the equitable principles with which it was instilled and fashioned the only appropriate remedy – giving the corporation legal title to a piece of property in which it already possessed equitable title.

Lastly, the cases that petitioners rely upon to support their claim are irrelevant in the context of the instant petition and merely complicate a relatively simple case unnecessarily. Those cases concern either states' claims to title of riparian or tidal lands or the creation of a public easement as a condition to development of beachfront property. Compare the fact of this case to *Nollan v. California Coastal Comm'n*, ___ *U.S.* ___, 107 *S.Ct.* 3141, ___ *L.Ed.*2d ___ (1987) (State imposed condition on permit to develop beachfront property located between two public beaches that property owner concede to a public easement to allow access across beach); *Hughes v. State of Washington*, 389 *U.S.* 290, 88 *S.Ct.* 438, 19 *L.Ed.*2d 530 (1967) (Action by owner of upland property that had been conveyed by the federal government prior to statehood against the State to determine ownership of accretions that had gradually formed by the ocean along the property); *Bonelli Cattle Co. v. Arizona*, 414 *U.S.* 313, 94 *S.Ct.* 517, 38 *L.Ed.*2d 526 (1973) (Suit to determine whether title to land that had been abandoned by a stream of the Colorado River due to federal rechanneling project vests in State as owner of beds under navigable streams within its borders or cattle company as owner of land riparian to

the River at the time of rechanneling); *Sotamura v. County of Hawaii*, 460 *F. Supp.* 473 (D. Hawaii 1978) (Action to determine the seaward boundary of beachfront property under state law); *Robinson v. Ariyoshi*, 441 *F. Supp.* 559 (D. Hawaii 1977), aff'd., 753 *F.*2d 1468 (9th Cir. 1985), vacated on other grounds, 477 *U.S.* 902 (1986) (Suit to determine whether surplus water from rivers belonged to State or property owner).

In the case *sub judice* the State has not asserted any property right to the "Round Valley" property. Title was transferred to High Point, a corporation for which a receiver was appointed only to carry out its closure responsibilities. The appointment of a receiver did not exonerate High Point from its statutory obligation to provide the necessary monies for the closure.

Thus, the circumstances of the instant appeal clearly dictate that this dispute stemmed from the improper use of corporate funds to purchase a parcel of land situated adjacent to the corporation's landfill, title to which was wrongfully placed in the names of the individual shareholders, officers and directors. By ordering the transfer of title to High Point and allowing the Receiver to use the property to help satisfy the corporation's responsibility under state law for the proper and safe closure of its sanitary landfill, the state trial court was exercising its equity jurisdiction under state law to remedy a decided wrong between private parties and permit the use of the land to satisfy a private statutory obligation. Both the lower and appellate court judgments rested solely on state grounds. Title to the "Round Valley" property was

clearly not taken by the State for any public use. Therefore, petitioner' federal rights were not implicated by the state court decision.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 88-1571

In The

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THOMAS H. DeLORENZO, MARLENE S. DeLORENZO AND HILLS OF WARREN,

Petitioners,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

On Petition For Writ Of Certiorari To The New Jersey Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a State Court commits an unconstitutional taking where it awards private property to a corporation which has a State agency as receiver, and where the State agency is the beneficiary of such award.

Whether there exists any independent and adequate State ground supporting the decision of the trial court to divest Petitioners of their real property.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Argument 1

THE TRIAL COURT'S JUDGMENT RESULTED IN PETITIONERS' PROPERTY BEING AWARDED TO THE STATE, AND WAS NOT SUPPORTED BY ANY INDEPENDENT AND ADEQUATE STATE GROUND..... 1

A. *The Trial Court's Judgment Resulted In Petitioners' Property Being Awarded To The State...* 2

B. *No Recognized Legal Or Equitable State Law Doctrine Implies That Petitioners Be Divested Of The Subject Property.* 4

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES

Blum v. Yaretsky, 457 U.S. 991 (1982) 4

Corporation of Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987) 8

Dunkin' Donuts v. Middletown Donut Corporation, 100 N.J. 166, 495 A.2d 66 (1985) 6, 7

Hughes v. State of Washington, 389 U.S. 290 (1967) 8

Lugar v. Edmonton Oil Co., 457 U.S. 922 (1982) 4

Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977), *aff'd.*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986) 8

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 4

Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Hawaii 1978) 8

Tulsa Professional Collection Services v. Pope, ___ U.S. ___, 108 S.Ct. 1340 (1988) 4

STATUTES

N.J.S.A. 13:1E-100, *et seq.* (Supp. 1989) 2

N.J.S.A. 13:1E-105 (Supp. 1989) 2

N.J.S.A. 13:1E-106 (Supp. 1989) 2

N.J.S.A. 13:1E-111 (Supp. 1989) 2

ARGUMENT

THE TRIAL COURT'S JUDGMENT RESULTED IN PETITIONERS' PROPERTY BEING AWARDED TO THE STATE, AND WAS NOT SUPPORTED BY ANY INDEPENDENT AND ADEQUATE STATE GROUND.

Petitioners argued in their Petition for Writ of Certiorari that the trial court's "backwards" application of the corporate opportunity doctrine constituted a radical and unforseeable change in state law which resulted in Petitioners' property being awarded to the State without just compensation or due process. Petitioners cited several decisions which either hold or imply that a court commits an unconstitutional taking where it effects a radical change in state law which results in private property being awarded to the State. (Petition, at 9-11).

Respondent's Brief in Opposition raises two points not previously addressed. First, Respondent asserts that the New Jersey courts did not actually award property to the State since, as Respondent suggests, the New Jersey Department of Environmental Protection (NJDEP) acted merely as a receiver of High Point Sanitation Company. (Respondent's Brief, at 11-13). Second, Respondent alleges an adequate state ground justifying the Court's holding, independent of the corporate opportunity issue, citing "time honored equitable principles". (Respondents' Brief, at 13). Each of these points will be addressed separately below.

A. The Trial Court's Judgment Resulted In Petitioners' Property Being Awarded To The State.

In attempting to avoid the implication that the trial court's decision resulted in the DeLorenzos' property being transferred to the State, Respondent highlights the fact that the NJDEP was appointed receiver of High Point. Respondent argues that since the State was merely acting as a receiver for the corporation, "title to the 'Round Valley' property was transferred to *High Point* and not to the NJDEP or the State." (Respondent's Brief, at 12-13) (Emphasis in original).

Despite this characterization by Respondent, the NJDEP cannot fairly assert that its involvement in this decision is only as a disinterested receiver. In 1981, New Jersey enacted the Sanitary Landfill Facility Closure and Contingency Fund Act. N.J.S.A. 13:1E-100, *et seq.* (Supp. 1989). That Act created the Sanitary Landfill Contingency Fund to be administered by the NJDEP. *Id.*, 13:1E-105. Pursuant to statute, "the fund shall be strictly liable for all direct and indirect damages, no matter by whom sustained, proximately resulting from the operations or closure of any sanitary landfill." *Id.*, 13:1E-106. The liability of the fund extends not only to the restoration of property and natural resources, but also to the costs of clean up and monitoring of landfills which present a "threat to the public health, safety and welfare of the citizens of this State . . . ." *Id.*, 13:1E-106(a)(1) through (4). The Act presupposes a right of subrogation against the owner or operator of a sanitary landfill facility. *Id.*, 13:1E-111.

In essence, the state fund administered by the NJDEP is strictly liable for expenses relating to clean up of this landfill facility, and any property the State acquires in the name of the corporation will go to the NJDEP to lessen that obligation. Thus, awarding the Round Valley property to the corporation has the direct effect of reducing the obligations of the State relating to closing the landfill. The trial court recognized that the State would be the true beneficiary if the Round Valley property were awarded to High Point. In fact, the Court relied heavily on that knowledge in deciding to utilize a novel doctrine to divest Petitioners of the property. As the trial court noted, the corporation only has $400,000 to apply to the estimated $8 million necessary to close the landfill, leaving "a very substantial shortfall *which will probably have to be made up from public funds*". (App. 16) (emphasis added). The trial court went on to note that the northern tract, because of its value on the commercial market, "would generate funds which could then be applied to the closure of the landfill." (App. 17). The court pointed out that declaring the property "as an asset of the corporation would be pragmatically beneficial to the Commissioner [of the NJDEP] with respect to his responsibility in closing the landfill . . . ." (App. 16-17).

In sum, Respondent cannot avoid the fact that, in substance, the Round Valley property was being given to the NJDEP. It is true that in this case the transfer was in two steps, with the Petitioners first providing the property to High Point, and then High Point providing same for use by the State. The trial court, however, made sure that both steps would take place at once, stating in paragraph 1 of its Judgment that the Petitioners are to transfer

the property to High Point, and then in paragraph 3 of the same Judgment ordering that High Point make the property available to the Commissioner of the NJDEP. (App. 3).

This Court should not accept the inference that because the subject property was technically awarded to High Point, it was not taken by the State. It has been repeatedly recognized in due process decisions that the fact that a State may operate through a private entity does not mean that there is no State action. As was recently noted in *Tulsa Professional Collection Services v. Pope*, ___ U.S. ___, 108 S.Ct. 1340 (1988), "when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found". *Id.* at ___, 108 S.Ct. at 1345, *citing, Lugar v. Edmonton Oil Co*, 457 U.S. 922 (1982); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). *See also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (State may be held responsible for private decision where it has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State").

B. No Recognized Legal Or Equitable State Law Doctrine Implies That Petitioners Be Divested Of The Subject Property.

In holding that Petitioners were to be divested of the Round Valley Property, the trial court relied solely on what it referred to as "a backwards application of the doctrine of corporate opportunity." (App. 8). The Petition

before this Court fully sets out that in applying the corporate opportunity doctrine to this Case, the trial court disregarded important requirements long accepted as necessary to invoking the doctrine. (Petition, at 12-13). In effect, the trial court radically and unforseeably altered the doctrine in making it applicable to these facts.

Because the Appellate Division vaguely noted that the result might be justified by some other State ground, the Petitioners also addressed whether any other theory implies the result obtained by the trial court. The Petition argued that the New Jersey courts could not justify this holding on the basis of the corporate statutes, or the equitable doctrines of "alter ego" and "piercing the corporate veil". (Petition, at 15-17).

Respondent's Brief does not cite any equitable theory in alleging an independent and adequate State ground. Rather, it simply posits that the Judgment "was based on time-honored equitable principles", and notes that "courts of equity are endowed with the flexibility to adapt proceedings and remedies to the circumstances of each case". (Respondent's Brief, at 13). The implication of the NJDEP is that equity courts have discretion to fashion relief even though there may have been no wrong under accepted equitable doctrines.

While it is a truism that courts of equity have substantial discretion to fashion a remedy, this presupposes that a party has committed some wrong pursuant to accepted equitable doctrines. "Corporate opportunity" is an equitable doctrine, as are the doctrines of "alter ego" and "piercing the corporate veil". In fact, these doctrines were addressed in the Petition because they are the only

three which might conceivably imply that the DeLorenzos should be divested of their individually owned property in order to satisfy corporate obligations. However, as the Petitioners argue, none of these doctrines would be applicable to these facts without being applied in some radical and unforeseen way.

In essence, Respondent's statement that equity will not suffer a wrong without a remedy begs the question. But for the trial court's novel application of the corporate opportunity doctrine, there would have been no wrong under State law warranting divestment of the DeLorenzos' property.

The New Jersey Supreme Court has itself recognized the limitations of a court of equity in granting relief where no wrong was committed under established doctrines. In *Dunkin' Donuts v. Middletown Donut Corporation*, 100 N.J. 166, 495 A.2d 66 (1985), the franchisee of a doughnut shop was found to have breached the franchise agreement. *Id.* at 173, 495 A.2d at 69. Although the franchise agreement provided that in such case the rights of the franchisee would terminate, the trial court fashioned an alternative remedy based on "equitable considerations" to replace the "disproportionately harsh" remedy set forth in the contract. *Id.* at 173, 495 A.2d at 69. The trial court ordered that the franchisee be paid $115,000 upon his surrender of the franchises. *Id.* at 174, 495 A.2d at 69.

The New Jersey Supreme Court reversed, finding that the court below had "altered the terms of the franchise agreements, slighted a substantial body of franchise law and trespassed on the franchisor's valid rights at

law". *Id.* at 170, 495 A.2d at 68. The *Dunkin' Donuts* court first discussed the prior law relating to franchise contracts, and finding no basis for the trial court's remedy, went on to state:

> Finding nothing in the general body of franchise law to indicate that [the franchisee] should receive value for his franchise as a condition of termination, we next examine whether the Chancery Division can nonetheless require such relief on the basis of its authority as a court of equity. We have uncovered no equitable maxim or other guiding principle that would support the court's disregard of the franchise agreements and modifications of the general body of franchise law discussed above. Although the remedy imposed by the Court was undoubtedly well-intentioned, naked references to "equitable considerations" are not sufficient support for the type of "creativity" unleashed here. We are not disposed to put all contractual rights at risk in the name of equity.

Id. at 181-82, 495 A.2d at 74.

The court went on to note that "equity will generally conform to established rules and precedents, and will not change or unsettle rights that are created and defined by existing legal principles". *Id.* at 183, 495 A.2d at 74. In rejecting the trial court's use of "equitable considerations", *Dunkin' Donuts* relied on the equitable maxim that "equity follows the law", and on "the settled principle that equity will grant relief in situations involving fraud, accident, mistake, duress, or undue influence, none of which have been established against [the franchisor]." *Id.* at 183-84, 495 A.2d at 74-75.

Given the *Dunkin' Donuts* decision, the assertion of the NJDEP that "equitable principles" justify the trial

court's decision must be rejected. In New Jersey, courts of equity must conform their decisions to equitable doctrines and maxims and cannot simply rely on undefined "equitable considerations".

Counsel for the Petitioners is not suggesting that State law doctrines must remain immutable, or that State courts are prohibited from progressively revising doctrines to meet the changing needs of society. Rather, counsel is seeking to have this Court recognize the rule suggested by Mr. Justice Stewart in *Hughes v. State of Washington*, 389 U.S. 290, 297-98 (1967) (Stewart, J., concurring), and applied in *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (D. Hawaii 1978), and *Robinson v. Ariyoshi*, 441 F.Supp. 559 (D. Hawaii 1977), *aff'd.*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 477 U.S. 902 (1986). That rule would provide a remedy only where a State court radically and unforeseeably effects a change in State law which results in an individual's property being awarded to the State.* In substance, the rule would protect an individual from changes in State law which appear to be motivated by a perceived need of the State to obtain a particular piece of property without just compensation.

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* It should be noted that even if the State were not the beneficiary of the property, there would still remain open the issue of whether the trial court violated Petitioner's due process rights through gross or arbitrary error in applying State law doctrines. *See Corporation of Presiding Bishop v. Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987).

CONCLUSION

For the reasons stated above, and in the Petition for Writ of Certiorari, Petitioners respectfully request that this Court issue a Writ of Certiorari to review the decisions of the New Jersey Courts.

Respectfully submitted,

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